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No. 84-1156
No. 84-1186

In The
Supreme Court of the United States
October Term, 1984

COX ENTERPRISES, INC. d/b/a
THE AUSTIN AMERICAN-STATESMAN
and
HOUSTON CHRONICLE PUBLISHING COMPANY,

Petitioners,

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent,

BROWN & ROOT, INC. and THE HALLIBURTON COMPANY,

Real Parties in Interest.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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February 14, 1985

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QUESTION PRESENTED

Whether a protective order based on good cause applying only to pretrial discovery materials and permitting public access to all hearings and any material upon which any judicial decisions are based meets the standards set forth by this Court in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984)?

PARTIES TO THE PROCEEDING BELOW

The Petitioner in No. 84-1156, Cox Enterprises, Inc., was the Relator in *Cox Enterprises, Inc. v. Hardy,* No. C-3253, in the Supreme Court of Texas.

Petitioner in No. 84-1186, Houston Chronicle Publishing Company, was the Relator in *Houston Chronicle Publishing Co. v. Hardy,* No. C-3400, in the Supreme Court of Texas.

The Respondent in both cases in the Supreme Court of Texas was the Honorable G. P. Hardy, Jr., District Judge of the 130th District Court, Matagorda County, Texas, serving by special appointment.

The Real Parties in Interest in both cases in the Supreme Court of Texas were Brown & Root, Inc., and the Halliburton Company.

Brown & Root, Inc. is a wholly-owned subsidiary of the Halliburton Company. A list of Brown & Root, Inc. and Halliburton Company subsidiaries (except wholly-owned) and affiliates is contained in the appendix to this brief.

TABLE OF CONTENTS

Page

Question Presented i

Parties in the Proceeding Below ii

Table of Contents iii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writs:

I. The Protective Order Meets the Standards Annunciated By This Court in *Seattle Times Co. v. Rhinehart.* 4

II. The Protective Order Was Entered With Good Cause Based on Proper Findings. 9

Conclusion 14

Appendix ..... App. 1

TABLE OF AUTHORITIES

CASES

In re "Agent Orange" Product Liability Litigation, 96 F.R.D. 582 (E.D.N.Y. 1983) 11

Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983) 8

Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1595 (1984) 6

CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) 8, 9

In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) 7

TABLE OF AUTHORITIES—Continued

Page

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34 (C.D. Cal), *mandamus granted,* 10 Media L. Rep. (BNA) 2430 (9th Cir.), *cert. dismissed,* 105 S. Ct. 768 (1984) 6, 7

In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d 1251 (N.D. Cal. 1974) 13

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 5

In re Halkin, 598 F.2d 176 (D.C. Cir. 1979) 13

Houston Chronicle Publishing Co. v. Hardy, 678 S.W.2d 495 (Tex. App.—Corpus Christi, 1984) ..... *passim*

Houston Lighting & Power Co., et al. v. Brown & Root, Inc., et al., No. 81-H-0686-C (130th Dist. Ct., Matagorda County, Tex.) 1, 7

Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied,* 460 U.S. 1051 (1983) 5, 7

Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984) 12

Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) 7

Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 654 P.2d 673 (1982), *aff'd,* 104 S. Ct. 2199 (1984) 11

In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) 8, 9, 11

Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984) ..... *passim*

United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980) 6

West v. Solito, 563 S.W.2d 240 (Tex. 1978) 13

TABLE OF AUTHORITIES—Continued

Page

Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980) 5

Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866 (E.D. Pa. 1981) 12, 13

RULES

FED. R. CIV. P. 26(c) 9

TEX. R. CIV. P. 186(b) 9, 11

TEX. R. EVID. 201(e) 10

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THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent,

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Real Parties in Interest.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT OF THE CASE

The respondent, the Honorable G. P. Hardy, Jr., a district judge who has served some 35 years, presides by special appointment over the massive South Texas Nuclear Project litigation. *Houston Lighting & Power Co., et al. v. Brown & Root, Inc., et al.*, No. 81-H-0686-C (130th Dist. Ct., Matagorda County, Tex.). The case was filed on

December 16, 1981, and has already resulted in a record of some 3,100 pages of transcripts of pretrial proceedings and some 1,600 pleadings and briefs comprising thousands of pages of records. Over 109,000 pages of deposition transcripts have been received and a large number of depositions remained to be taken. Defendants have produced some 23.7 million pages of documents and plaintiffs have produced some 6.2 million pages. To visualize the magnitude of this production, if copies of the documents were stacked, the pile would reach almost two miles in height. Substantial document production remains to be completed. At least 100 lawyers are actively engaged in pretrial preparation.

The protective order considered here was entered after both petitioners and the parties to the suit were given full opportunity to be heard. Four of the six parties to the suit consented to the entry of the order. Petitioners, Cox Enterprises, Inc. and the Houston Chronicle Publishing Company, appeared at the November 17, 1983 hearing during which the protective order was considered. Neither petitioners nor any party to the suit sought an opportunity to present evidence. Neither petitioners nor any party objected to the propriety of the trial court taking judicial notice of the evidentiary facts underlying its finding of good cause for the entry of the protective order. Under Texas law they thereby waived the right to complain of the lack of an evidentiary hearing on those matters.

The order is extremely limited and merely:

(1) Requires the attorneys for the parties to honor the provisions of the Texas Code of Professional

Responsibility governing comments to the media in civil cases;

(2) Requires the parties, their attorneys and assistants, and court personnel to refrain from disclosing to third parties information obtained through the Court's discovery processes; and

(3) Seals the depositions, interrogatory answers and other documents that are obtained in discovery and may be offered in evidence.

It provides that:

(4) There shall be no limitation on access to hearings and evidence offered therein;

(5) There shall be no limitation on the media's right to publish information it has obtained or may obtain from other sources;

(6) There is no limitation on the attorneys' right to communicate with their clients; and

(7) The Court will entertain reasonable requests to modify the order.

The order specifically does not apply to:

(8) The pleadings, briefs and legal memoranda filed in this case.

The Cities of Austin and San Antonio and petitioners filed applications for writs of mandamus in the Court of Appeals for the Thirteenth Judicial District sitting in Corpus Christi, Texas. The Court of Appeals rendered an opinion comprehensively rejecting all of the arguments advanced by the objecting parties, including arguments concerning the use by Judge Hardy of judicial notice of the matters supporting the entry of the protective order. [App. 5-35; *Houston Chronicle Publishing Co. v. Hardy,* 678 S.W.2d 495 (Tex. App.—Corpus Christi,

1984).] Cox Enterprises, Inc., the Houston Chronicle Publishing Company, and the City of Austin thereupon renewed their applications for writs of mandamus in the Texas Supreme Court. Following extensive briefing, the Texas Supreme Court summarily overruled all applications.

———o———

REASONS FOR DENYING THE WRITS

I.

The Protective Order Meets the Standards Annunciated By This Court in Seattle Times Co. v. Rhinehart.

The decision of the court below is fully in accord with this Court's decision in *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984). It raises no new issues for this Court's consideration.

A salient fact petitioners attempt to obscure is that the protective order entered here in no way limits petitioners' access to judicial hearings or to any evidentiary material upon which judicial action is based. Therefore, all of the cases that deal with limitations on access to judicial hearings—whether pretrial or during trial—are irrelevant. Judge Hardy's order makes clear that the public shall have full access to all pleadings, briefs, judicial hearings, and any evidentiary materials introduced in such hearings or, of course, later at the trial. As succinctly stated by the Court of Appeals, "Media representatives have only been denied *their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings by Judge

Hardy's order." [App. 15; 678 S.W.2d at 499 (emphasis in original).]

In *Rhinehart,* the Court upheld a protective order that, like the order here, prohibited disclosure of pretrial discovery materials. The Court held that "pretrial depositions and interrogatories are not public components of a civil trial." *Id.* at 2207. In reaching this conclusion, the Court cited Chief Justice Burger's concurring opinion in *Gannett Co. v. DePasquale,* 443 U.S. 368, 396-97 (1979). The Chief Justice stated:

> [D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. . . .
>
> For me, the essence of all of this is that by definition "pretrial proceedings" are exactly that.

The distinction between prohibiting disclosure of raw, undigested discovery materials and prohibiting disclosure of materials made the basis of a judicial decision is widely recognized in the case law. For example, in *Wilk v. American Medical Association,* 635 F.2d 1295, 1299 n.7 (7th Cir. 1980), the court observed:

> If the purpose of the common law right of access is to check judicial abuses . . . then that right should only extend to materials upon which a judicial decision is based.

Similarly, in *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied,* 460 U.S. 1051 (1983), the court stated:

> Protective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial. Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public. . . .
>
> At the adjudication stage, however, very different considerations apply. An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.

See also United States v. Hubbard, 650 F.2d 293, 316-17 (D.C. Cir. 1980).

Cases relied upon by the petitioners, such as *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1595 (1984), and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 101 F.R.D. 34 (C.D. Cal.), *mandamus granted,* 10 Media L. Rep. (BNA) 2430 (9th Cir.), *cert. dismissed,* 105 S. Ct. 768 (1984), are perfectly consistent with the protective order entered here. Both of these cases distinguish between raw pretrial documents and those documents made the basis of a judicial decision. In *Brown & Williamson,* the Sixth Circuit granted access to certain documents made the basis of a judicial decision because "court records often provide important, sometimes the only, bases or explanations for a court's decision." 710 F.2d at 1177.

Similarly, *Petroleum Products* is consistent with the order entered by Judge Hardy. In *Petroleum Products,* the documents at issue were documents on which a trial court intended to base a judicial decision. These documents included the parties' pretrial briefs, summary judgment briefs, and the supporting exhibits submitted to the

court. 101 F.R.D. at 43 n.9. The court specifically distinguished between the documents at issue and the "raw fruits of discovery." *Id.* at 38. All of the types of documents ordered released by the court in *Petroleum Products* have been and will continue to be available to the public in *Houston Lighting & Power Co., et al. v. Brown & Root, Inc., et al.* Nothing in Judge Hardy's order purports to exclude from public access any of the briefs, pretrial memoranda, or attached exhibits ordered released in *Petroleum Products.*[1] In fact, Judge Hardy's order specifically contemplates that such materials shall be publicly available.[2]

The Ninth Circuit's opinion lifting the temporary stay ordered by the trial court in *Petroleum Products* adds nothing to this analysis. The Ninth Circuit specifically relied upon cases that distinguished between pretrial documents and those documents made the basis of a judicial decision. The court stated:

> Unlike the situation in *Seattle Times Co. v. Rhinehart*, . . . the documents at issue here are not the raw fruits of discovery, but are public components of a civil trial.

10 Media L. Rep. (BNA) at 2431.

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[1] Indeed, Judge Hardy denied the motion of plaintiff Houston Lighting & Power Co. to modify the protective order to require exhibits attached to briefs and motions to be filed under seal.

[2] The other cases cited by the petitioners also involve only access to documents made the basis of a judicial decision. *See Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059 (3d Cir. 1984) (closed hearing on motion for preliminary injunction); *In re Continental Illinois Securities Litigation,* 732 F.2d 1302 (7th Cir. 1984) (report of special litigation committee made the basis of a judicial decision); *Joy v. North,* 692 F.2d 880 (2d Cir. 1982), *cert. denied,* 460 U.S. 1051 (1983) (same).

The petitioners argue that the Court of Appeals distinguished erroneously between right of access in criminal cases and civil cases. Manifestly, the Court of Appeals made no such distinction. The Court of Appeals distinguished between access to judicial proceedings (a concept applicable to both civil and criminal matters) and access to the raw pretrial discovery involved here. *See* App. 13-18; 678 S.W.2d at 498-500. The Court of Appeals found the criminal cases relied upon by the petitioners to be inapposite since they dealt with the right of the public to attend judicial proceedings.

The only case cited by petitioners that involved pretrial documents in a criminal case, *Associated Press v. United States District Court,* 705 F.2d 1143 (9th Cir. 1983), is not remotely analogous to the present case. *Associated Press* did not involve discovery, but rather criminal "pretrial proceedings and the documents filed in regard to them." *Id.* at 1145. Here the documents analogous to those in *Associated Press*—pleadings, briefs, and exhibits to motions—are expressly open to public inspection under the protective order.

Cox Enterprises also argues that the Court of Appeals' opinion is in conflict with *In re San Juan Star Co.,* 662 F.2d 108 (1st Cir. 1981), and *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975), because Cox Enterprises alleges that the Court of Appeals denied the newspapers standing to challenge the protective order. However, the Court of Appeals made no holding that newspapers lacked *jus tertii* standing to attack protective orders. The Court of Appeals' decision is a direct consideration of the substantive issues presented.

Indeed, Cox Enterprises ignores that, as a substantive matter, both of these cases provide strong suppport for the order entered here. *San Juan Star* expressly affirmed an order prohibiting disclosure of deposition contents to the press or public. 662 F.2d at 1118. *CBS* struck down a protective order prohibiting the participants in the litigation from "discussing in any manner whatsoever these cases with members of the news media or the public." 522 F.2d at 236. In contrast, the present order applies only to the raw fruits of the discovery process.

II.

The Protective Order Was Entered With Good Cause Based on Proper Findings.

Similar to Fed. R. Civ. P. 26(c), Tex. R. Civ. P. 186(b) authorized the trial judge "upon notice and for good cause shown" to enter a variety of orders concerning discovery, including an order that, after being sealed, depositions "shall be opened only by order of the court," or "any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression or expense."

Both petitioners contend that the protective order was entered without a showing of good cause. The record belies such a contention. The petitioners assiduously resist acknowledging that Judge Hardy properly took judi-

cial notice under Texas law of factors that clearly supported the entry of the protective order.

Judge Hardy determined that the likelihood is great that potential jurors will be prejudiced by pretrial publicity in this case. That judgment was informed by more than three decades of judicial experience in the court in which this case will be tried and was supported by careful consideration of the particularized circumstances of this case, including: the small size of Bay City, Texas; its proximity to the South Texas Nuclear Project; the unusually emotional nature of the issues involved in the litigation; the pretrial status of the case; the complexity of the suit; and the enormous number of discovery materials involved. The court concluded that in these circumstances selective disclosure before trial of parts of an enormous volume of discovery materials could present materially false impressions as to the merits of the parties' claims and interfere with the right to a fair trial to which all parties are entitled.

These findings are undoubtedly sufficient to support the entry of a protective order and were made only after petitioners had full and fair opportunity to participate in the hearing of November 17, 1983, in which entry of the protective order was considered. Both petitioners had full opportunity to object to Judge Hardy's taking judicial notice of the factors enumerated in his order, but did not do so. As a matter of state evidentiary law, the Court of Appeals correctly held that petitioners waived their right to complain about the court's taking of judicial notice. *See* Tex. R. Evid. 201(e). [App. 34-35; 678 S.W.2d at 508.]

In *Seattle Times Co. v. Rhinehart,* this Court stated, "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." 104 S. Ct. at 2209. The Supreme Court of Washington in *Rhinehart* held that " 'good cause' is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process." *Rhinehart v. Seattle Times Co.,* 98 Wash. 2d 226, 256, 654 P.2d 673, 690 (1982), *aff'd,* 104 S. Ct. 2199 (1984). This Court said of the Washington Supreme Court's determination, "It is sufficient for purposes of our decision that the highest court in the state found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law." 104 S. Ct. at 2209.

Similarly, the Texas Supreme Court has found no abuse of discretion by Judge Hardy in the entry of this protective order under Rule 186(b), which plainly requires a showing of good cause.

Contrary to the petitioners' various assertions, good cause for entry of a protective order does not require certainty, but only "a reasonable likelihood" of injury to interests protected by the rule. Clearly, the parties' right to a fair trial is such an interest. Thus, *In re San Juan Star Co.,* 662 F.2d 108 (1st Cir. 1981), upheld an order preventing disclosure of deposition testimony since pretrial publicity posed "at least a reasonable likelihood of a material harm to defendants' right to a fair trial." *Id.* at 117.

Judge Hardy's reasons for entry of the protective order are firmly based in the case law. In *In re "Agent*

Orange" Product Liability Litigation, 96 F.R.D. 582, 583 (E.D.N.Y. 1983), the court agreed with the findings of a special master that good cause existed for the protective order due to the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date." *See also Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 529 F. Supp. 866, 891 (E.D. Pa. 1981) ("good cause" for a protective order limiting disclosure of discovery documents is not susceptible to any "hard and fast rules").

The petitioners mistakenly argue that the entry of a protective order should be supported by findings similar to those made when the decision is to prohibit access to a judicial proceeding. The petitioners' argument is expressly rejected by this Court in *Rhinehart.* In that case, this Court stated that "no heightened First Amendment scrutiny" is necessary to support the entry of a protective order. 104 S. Ct. at 2209. This must be contrasted with the extremely heavy showing that must support a trial judge's decision to close a judicial proceeding to public attendance. *See Press-Enterprise Co. v. Superior Court,* 104 S. Ct. 819 (1984).

Last, we note that any course other than the one taken by Judge Hardy would make the litigation process a shambles. As discussed previously, the documents produced and the depositions taken in this case total many millions of pages. The petitioners concede that they do not seek access to any confidential materials. If Judge Hardy may enter a protective order protecting confidential business records or sensational or highly prejudicial informa-

tion, even the petitioners must concede that the parties have a right to have a determination made by the trial court of which documents are confidential or highly prejudicial. *See In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases,* 18 Fed. R. Serv. 2d 1251, 1252 (N.D. Cal. 1974); *West v. Solito,* 563 S.W.2d 240 (Tex. 1978).

There are already 30 million pages of documents in this case. Assuming for the moment that Judge Hardy could efficiently review a single page of deposition testimony or other documentary material in one minute, it would take Judge Hardy 30 million minutes to review the pretrial documents covered under the protective order. If a 2,000-hour work year is assumed, it would take Judge Hardy 250 years to review the documents in order to protect confidential business information or sensational or highly prejudicial information from disclosure. The course undertaken by Judge Hardy has been routinely recommended in other large cases. *See In re Halkin,* 598 F.2d 176, 196 n.47 (D.C. Cir. 1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 529 F. Supp. 866, 889 (E.D. Pa. 1981).

Judge Hardy's protective order was carefully crafted. It expressly opens to the public all judicial proceedings. It exempts from the ambit of the order any documents submitted to the court for a judicial decision. The only materials not subject to public scrutiny at this time are the raw pretrial discovery materials that this Court has held do not constitute the public components of a civil trial.

———o———

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Halliburton Company subsidiaries (except wholly-owned) and affiliates are:

AMSITO Oil Wells Services (Malaysia) Sdn. Bhd.
Arabian Halliburton Service Company Limited
Barita de Santa Rosa S.A. de C.V.
Bentonita de Mexico S.A. de C.V.
Global Chemicals, Inc.
Halliburton India, Inc.
Halliburton Nigeria Limited
IMCO Servicios Y Manufacturas Quimicas
Marmin Trading & Supply Company
NUS Corporation
Oman Drilling Products Company, L.L.C.
Oriental Gold Co., Ltd.
Otis of Nigeria Limited
Otis-Saudi, Limited
P.T. IMCO Services Indonesia
Productos Industriales de Veracruz, S.A. de C.V.
Unibario, S.A.

Brown & Root, Inc. subsidiaries (except wholly-owned) and affiliates are:

Al-Rushaid Taylor Diving Ltd.
Brownaker Offshore A/S
Brown & Root—Alireza W.L.L.
Brown & Root Arabia, Limited
Brown & Root Constructores Petroleros de Venezuela, C.A.
Brown & Root do Brasil Servicos Maritimos Ltda.
Brown & Root—Egyptian Constructors S.A.
Brown & Root Ingenieros Petroleros de Venezuela, C.A.
Brown & Root—Kokan Offshore Constructors, S.A.
Brown & Root (Malaysia) Sdn. Bhd.
Brown & Root—Malta Limited

Brown & Root Mid East L.L.C.
Brown & Root Nigeria Limited
Brown and Root Orient, S.A.
Brown & Root—Saudi Limited
Brown & Root—Wimpey Highlands Fabricators Limited
Burro Chief Copper Company
China Brown & Root Marine Engineering and Construction Company, Ltd.
COES-Brown & Root Marine Construction Company Limited
Concretos Industriales, C.A.
Constructores de Venezuela, Brown & Root, Inc., C.A.
Consultores Maritimos del Golfo, S.A. de C.V.
Contratistas del Lago, C.A.
Corporacion de Construcciones de Campeche, S.A. de C.V.
Deepwater Holdings B.V. (Formerly Trans-Marine Engineering & Equipment B.V.)
Diving Contractors (Malaysia) Sendirian Berhad
Durable Railway Track & Turnouts, Inc.
Equipos del Lago, C.A.
Getec, S.A. de C.V.
Jackson Marine (Dubai) Limited
Jackson Marine (Malaysia) Sdn. Bhd.
Jackson Marine Mashor Private Limited
Martec-Engenharia e Obras Ltda.
Moroccan Engineers & Constructors
National Marine Services, Ltd.
NKK-Brown & Root Overseas, S.A.
NUS Corporation
P.T. Brown & Root Indonesia
Parco Brown & Root, Inc.
Pearl River Sand & Gravel Company
Port Harcourt Oil Services Limited (Formerly Wimpey-Brown & Root (Nigeria) Limited)
Prestressed Concrete Products Company, Inc.
Raymond-Brown & Root, C.A.
Rezayat-Brown & Root E.C.

Sale Pipe Mill Pty. Limited
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Wilbar Offshore A/S